per se (*Kang Yeow Hooi v. Public Prosecutor*[4]). Moreover, although the offence (there is in fact only one although there are three charges) is punishable with twelve months' imprisonment in addition to a fine it is much more usual in these cases to impose a fine than imprisonment.

With regard to the suggestion that there was a possibility that the accused might not appear at their trial, I would observe that as a possibility this exists in every case.

I am of opinion that when section 57 of the Criminal Procedure Code is read in conjuction with the other provisions of the Code and in the light of the principles enunciated in the relevant authorities it becomes clear that there must be reasons connected with the particular case for making an order under the section and it is only when such reasons exist that the Magistrate can exercise a discretion as to whether or not in the circumstances an order should be made. There being in the present case nothing on the record to indicate that this was an unusually bad case of assisting in carrying on a public lottery and no reasons having been given by the prosecution for supposing that these particular accused might not appear at their trial it seemed to me that there was really no material upon which the learned Magistrate could exercise a discretion one way or the other.

For these reasons I allowed the appeal and set aside the learned Magistrate's order.

Appeal allowed.

REG. v. LIM CHENG TONG

[A. Cr. J. (Spenser Wilkinson J.) November 28, 1955]

[Penang — Criminal Appeal No. 52 of 1955]

Customs Ordinance 1952, ss. 119, 129 and 131 — Sentence — Quantum of fine — Default sentence of imprisonment should bear some relationship to the amount of the fine.

In this case the respondent was convicted on his plea of guilty on a charge of knowingly harbouring uncustomed goods, to wit, 12 gold bars of a total value of $14,500 an offence under s. 131 of the Customs Ordinance. The minimum fine which could be imposed under the section was a fine of $5,000 and the maximum was $43,500.

The learned President of the Sessions Court imposed a fine of $15,000 with 30 days' imprisonment in default. The Crown appealed against this sentence on the ground that the period of 30 days' imprisonment could not properly be regarded as satisfying the justice of the case and bore no relation to the maximum laid down by s. 119 of the Customs Ordinance, whereby the maximum period of imprisonment in default of payment of a fine is 3 years' imprisonment in respect of any fine from $1,600 upwards.

Held: (1) where as in this case a minimum fine is prescribed, the Court should as far as may reasonably be done in the circumstances of each case, tend to impose only the minimum fine in those cases where it is clear that the accused will be unable to pay even that amount; (2) where a fine is imposed the term of imprisonment in default should bear some relationship to the amount of the fine and there should be a reasonable proportion between the amount of the fine and the extent of the imprisonment in default; (3) in this case the sentence should be altered to a fine of $5,000 or nine months' imprisonment in default.

Case referred to :—

(1) *Public Prosecutor v. Sim Moh Ee* (1946) M.L.J. 88.

MAGISTRATE'S CRIMINAL APPEAL.

D. C. Jackson (Sr. Federal Counsel) for the Crown.

Respondent in person.

Spenser Wilkinson J. : — The respondent in this case was charged with two charges in respect of the smuggling of twelve gold bars of a total value of $14,500 into the Customs area of Butterworth. The first charge was laid under section 129(1)(e) of the Customs Ordinance, 1952 for failing to declare these gold bars; and the second charge was laid under section 131(1)(d) of the same Ordinance for knowingly harbouring uncustomed goods being the same gold bars. The accused pleaded guilty to both offences and there was no doubt upon the facts that this was a deliberate attempt to smuggle this large quantity of gold into the Customs area.

The learned President who tried the case convicted the accused on the second charge and stayed the trial on the first charge under section 180 of the Criminal Procedure Code. I am not prepared to say that the learned President was wrong in doing this but as it turned out it was perhaps unfortunate that he selected the second rather than the first charge upon which to convict, for it was only after he had convicted upon the second charge that he was made aware of the financial position and circumstances of the accused. It then appeared that the accused was a lorry driver earning $200 a month and supporting an aged mother, a wife and three young brothers. In those circumstances, even the minimum fine laid down by law under section 131 of the Customs Ordinance appears to be a severe fine and one which it is unlikely that the accused would be able to pay.

The learned President no doubt having in mind the large quantity of the gold in question and wishing to mark the seriousness of the offence with a view to deterring others imposed a fine of $15,000 with 30 days' imprisonment in default. Against this sentence the Crown appealed on the ground that the period of 30 days' imprisonment could not properly be regarded as satisfying the justice of the case and bore no relation to the maximum laid down by section 119 of the

Customs Ordinance, whereby the maximum period of imprisonment in default of payment of a fine is three years' imprisonment in respect of any fine from $1,600 upwards.

It appears to me from his grounds of decision that the learned President has to some extent assessed the sentence upon wrong principles. He states, for example :—

"A man who cannot pay the fine is imprisoned not because he committed the offence but because he is not rich enough to pay the fine."

I do not think this is correct. An offender who is fined is imprisoned for failure to pay the fine. It must be borne in mind that his liability to pay the fine is in fact not extinguished by undergoing the sentence of imprisonment in default. The learned President also states in his grounds of decision :—

"By pleading guilty the accused admitted his guilt and regrets having committed the offence. I considered that he thereupon became partly reformed."

I am unable to accept the suggestion that an accused by admitting his guilt necessarily regrets having committed the offence. He may do so or he may not. Indeed, I think it is true to say that many accused who claim trial regret committing the offence; and that the usual reason that a man pleads guilty is that he is well aware that he has no defence.

However, this may be, the question of real difficulty which presents itself in regard to the assessment of fines under section 131 of the Customs Ordinance is the construction to be placed on the punishment provisions of this section which has been described by Laville J. in the case of *Public Prosecutor v Sim Moh Ee*[1] as an omnibus section laying down the same penalty for a variety of offences and which lays down not only a maximum penalty but also a minimum. In the present case, for example, the minimum fine which could be imposed on the accused was $5,000 and the maximum was $43,500. Is the intention of the Ordinance that the most trivial of the offences dealt with in section 131 is to be punished with the minimum fine and anything more serious with a fine between the minimum and the maximum? Or is it the intention, on the principles of Magna Carta and the Bill of Rights that all those accused whose financial circumstances will not bear a heavy fine should be fined the minimum notwithstanding the gravity of the offence? There is much to be said in favour of either of these construction, but I am inclined to think that the general principle is that where, as has been done in the Customs Ordinance, the Legislature derogates from the ancient rights of the subject it should be construed so as to limit those rights as little as possible. I am inclined to think, therefore, that as far as may reasonably be done in the circumstances of each case the Court should tend to impose only the minimum fine in those cases in which it is clear that the accused will be unable to pay even that amount.

There is, however, another consideration which has mainly influenced me in my decision in the present case and that is that the learned President had the choice of convicting the accused not on the second charge but on the first. The penalty laid down under section 129 of the Ordinance is imprisonment for a term not exceeding twelve months or a fine not exceeding $5,000 or both. When one considers the offences in the present case in the light of section 129 it seems to me that the learned President would have been fully justified in sentencing the accused to a period of imprisonment without the option of a fine. It may be that the learned President had this in mind in imposing upon the accused a fine which it is quite clear he would be unable to pay, but if this was his view then it appears to me that he was in effect imposing a sentence of one month's imprisonment which in my view was clearly inadequate in respect of smuggling $14,500 worth of gold.

Moreover, I am in agreement with the general proposition for which the Crown in this case contended that where a fine is imposed the term of imprisonment in default should bear some relationship to the amount of the fine. The scale laid down by section 119 in respect of offences under the Customs Ordinance provides for a maximum of two months' imprisonment where the fine does not exceed $25. To impose as imprisonment in default of payment of a fine of $15,000 only half the maximum laid down in respect of a fine $25 appears to me to be entirely disproportionate; for I think the Legislature in laying down this scale discloses a clear intention that there should be a reasonable proportion between the amount of the fine and the extent of the imprisonment in default.

Bearing in mind, therefore the possible punishments under section 129 of the Ordinance I decided to alter the sentence from one of $15,000 or 30 days to a fine of $5,000 or nine months' imprisonment in default.

Sentence altered.